

Court of Appeals No. 44240-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JUSTIN M. NELSON and ALLISA S. ADAMS-NELSON,

Appellants,

v.

**SKAMANIA COUNTY, WASHINGTON,
and SHANNON FRAME and JANE DOE FRAME,
and the community thereof;**

Respondents.

**REPLY BRIEF OF APPELLANTS
(TO BRIEF OF SKAMANIA COUNTY)**

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I. CORRECTION OF ERRATA

The word “not” was omitted from the sixth line on page 20 of the *Brief of Appellants* – the entire sentence should read as follows:

Continuation does not apply to takings; rather, “[a] new taking cause of action accrues with each measurable or provable decline in market value of the property.” *Highline School Dist. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976).

* * *

II. CORRECTION OF FACTUAL MISSTATEMENTS

Skamania County alleges that “the old dump site was cleaned up” “more than 30 years ago,” citing “CP 42-43.” *Seriatim*. The phrase “was cleaned up” is often used to infer restoration, while the record cited actually declares that “the County engaged in extensive clean-up activities to remove solid waste which had been deposited on the ground at the old burn dump site.” *CP 43*, ln. 6-7. Webster’s defines the *verb intransitive* form of “engage” as follows: “1. to pledge oneself; promise; undertake; agree: as don’t *engage* to do unless you have time. 2. to occupy or involve oneself; take part; be active: as she engaged in dramatics.” *Webster’s New World Dictionary*, Coll. Ed. 1958, New World Pub., at 481. The phrase “engaged in” is equally consistent with the conclusion that clean-up was not completed.

Mr. Uhlig, the declarant at CP 42-43, never uses the universal adjective “all;” rather, he declares merely that clean-up was *undertaken*. Hence, his declaration constitutes an admission that solid waste was present, without any indication regarding the thoroughness of “clean-up.” Moreover, as the County has distinguished between the current transfer station, which occupies the “old dump site,” and the remainder of the County’s 9.46-acre parcel, we must infer that Mr. Uhlig expresses no representation regarding clean-up of unimproved areas which the County admits are “heavily forested.” CP 31, ln. 6-7; and CP 32, ln. 16.

The County alleges that “[t]he transfer station is more 700 feet from the boundary with the neighboring property to the north,” citing “CP 2.” *Seriatim*. The page cited is actually the second page of the *Amended Complaint*, which does not allege any distance between the transfer station and plaintiffs’ property, and we find none in the record.

The County cites “CP 47” for the proposition that “Nelson purchased the adjacent property . . . some 30 years after the dumpsite had been discontinued and cleaned up.” *Brief of Respondent* at 1. The page cited is authority for the date of plaintiffs’ purchase, not for the discontinuation nor “cleaned up” of the dumpsite. CP 47; *see also page one, supra*.

Skamania County alleges that there is “no competent evidence of new and different damage.” *Brief of Respondent* at 2. Contrary to the County’s allegation, Greg Morris declared, based upon multiple observations of plaintiffs’ property “over the last four years,” “including observations made this year, it appears that the garbage strewn throughout Mr. Nelson’s property and in the creek is of the same source and continuously migrating down the hill from its origin, the old Skamania County landfill.” *CP 189*. Warren Krager, R.G., C.E.G., plaintiffs’ geotechnical expert, attested as follows:

We reviewed aerial photographs of the subject area that are available on Google Earth and Terra Server websites in an effort to discern the source and timing of landfill releases onto your property and the debris flow into the ravine and tributary creek on your property. Aerial photographs from 1993 to 2011 were available from the website sources. . . . it is clear in both a Google Earth aerial photograph dated June 26, 2009 and a Terra Server aerial photograph dated August 1, 2009, that a light colored debris flow scar is visible from the Skamania County Transfer Station down the west ravine wall. . . .

This debris flow scar was not present in the earlier available photographs from June 23, 2006, and July 23, 2006 on the aerial photograph websites. However, a Skamania County Code Violation / Nuisance / Complaint report, received by Skamania County on June 21, 2005, describes clear observations of a landfill refuse slide that is moving from county property onto Tax Lot 201 [plaintiffs’ property]. Washington Department of Ecology Environmental Report Tracking System data sheets that you provided indicate that site investigations of the contamination and landfill refuse

slide into the creeks were made by State of Washington personnel from October of 2008 to January of 2009. Based upon these dates, multiple landfill refuse laden debris flows from Tax Lot 200 [County property] have been moving into the lower ravine on Tax Lot 201 [plaintiffs' property] from at least as early as Summer 2005 and continuing through late Summer of 2009 . . .

CP 172-73.

Skamania County alleges that “plaintiff admitted to the trial court that any remaining damage is permanent and cannot be reasonably abated.” *Brief of Respondent* at 2. Contrary to the County’s allegation, plaintiffs did *not* admit anything whatsoever regarding abatement; however, this allegation raises legal issues addressed at pages 6-9 *infra*.

Skamania County alleges that “Nelson visited and inspected the adjacent property on three separate occasions before purchasing it,” citing “CP 47.” *Brief of Respondent* at 3. The apparent inference is that plaintiffs knew the condition of the property prior to closing. In order to avoid any confusion, we note that plaintiff Justin Nelson elaborates upon his “visits” as follows: (i) the first time, “the property was snow covered . . . [p]robably six or eight inches of snow;” (ii) the second time, “[w]e didn’t look around too much because it was pouring rain sideways;” and (iii) a third time, without the seller, he did not know where boundaries are located. *CP 47*. This testimony

is supported by the Department of Ecology Environmental Report Tracking System, which memorializes William J. Weller's comment, dated October 29, 2007, as follows:

Mr. Nelson showed me the dump site yesterday. He wasn't aware of it when he bought the 9 acres last winter when it was under a foot of snow.

CP 136.

Skamania County discusses alleged code violations on the part of plaintiffs, citing "CP 50-55." This material was the subject of a *Plaintiffs' Motion to Exclude Evidence, CP 191-95*, the denial of which is at issue in the present appeal. However, the County goes on to allege that "Nelson . . . retaliated by claiming that debris on his property originated from Skamania County's old dumpsite," citing "CP 56." *Brief of Respondent* at 4. There is no evidence of retaliation, either at CP 56 or anywhere else in the record.

Skamania County repeatedly alleges that the relevant three-year period prior to filing is "after 2009." *Brief of Respondent* at 11; and *seriatim*. The present case was filed March 13, 2012, *CP I*, ln. 18; hence, the relevant three-year period is March 14, 2009 through March 13, 2012.

* * *

III. ARGUMENT

Permanent Taking and Abatable Trespass

Skamania County argues that “Nelson’s attorney expressly represented to the trial court that the damage of which Nelson complains is permanent and cannot be abated[, and t]hese statements by plaintiffs’ counsel are property treated as admission of a party.” *Brief of Respondent* at 16. The County misleads the court because the plaintiffs never argued that the *trespass* cannot be “abated,” rather, they argued a permanent *taking* cannot be “restored” to its original condition. *CP 267*, ln. 10-11.

The County confuses *argument* with *admission*, inferring that the plaintiffs cannot argue alternative theories. The County’s position is contrary to CR 8(e)(2), which provides that “[a] party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.” *Id.* The pleading of alternative theories is no value whatsoever if such theories cannot be argued.

More importantly, the County’s argument reveals a confusion regarding rules which govern trespass and takings, upon which its entire defense is based. The Washington Supreme Court has noted that, “a plaintiff must demonstrate a chronic and unreasonable pattern of behavior by the

government to support a claim for inverse condemnation by physical invasion.” *Orion Corp. v. State*, 109 Wash.2d 621, 671, 747 P.2d 1062 (1987). A “chronic and unreasonable pattern of behavior” can be altered, and conditions which result in debris migration can be corrected.

In the present case, the County’s chronic and unreasonable pattern of behavior consists in allowing debris to migrate and remain upon plaintiffs’ property. The County has alleged that the source of debris, the landfill dumpsite, has not operated since 1978, *CP 43*; and the record reveals that the County has been aware of debris migration onto plaintiffs’ property, without taking corrective action, at least since June 21, 2005, when a prior owner filed an administrative complaint with the Skamania County Engineer’s Office. *CP 135*. It seems beyond dispute the County’s behavior has been chronic.

Hence, plaintiffs argued, *in alternative to trespass*, that the *taking* is permanent because the County refuses to alter its chronic and unreasonable pattern of behavior of allowing continuing debris migration. Of course, *permanence* in takings law pertains to damages, based upon diminution in market value rather than cost of restoration and loss of use. *Olson v. King County*, 71 Wash.2d 279, 293-94, 426 P.2d 562 (1967). It would be odd, indeed, if plaintiffs were required to argue the defense of available mitigation

to reduce their own damages.

On the other hand, “reasonable abatability of an intrusive condition is the primary characteristic that distinguishes a continuing trespass from a permanent trespass.” *Fradkin v. Northshore Utility District*, 96 Wash.App. 118, 125-26, 977 P.2d 1265 (1999). Moreover, a trespass “is abatable, **irrespective of . . . permanency** . . . so long as the defendant can take curative action to stop the continuing damages.” *Id*, emphasis added. Hence, an invasion may constitute both: (i) a permanent taking, if the government refuses to alter chronic and unreasonable patterns of behavior, and (ii) a continuing trespass, if abatement is reasonable. It would seem trivially true that the *reasonable* abatement is consistent with *unreasonable* patterns of behavior – if government behavior is unreasonable, then termination of that behavior would seem reasonable. Moreover, this position is consistent with the Supreme Court’s decision in *Olson*, that:

Every trespass upon, or tortious damaging of real property does not become a constitutional taking or damaging simply because the trespasser or tortfeasor is the state or one of its subdivisions, such as a county or a city.

Olson, 71 Wash.2d at 284.

An “abatable nuisance” is defined as “nuisance which is practically

susceptible of being suppressed, or extinguished, or rendered harmless, and whose continued existence is not authorized under law.” *Blacks Law Dictionary*, Sixth Edition, 1990, at 4. Hence, the term “abatement” would seem to include prevention of further damage, and mitigation aimed at eventual restoration of environmental values, which is far more inclusive than “restor[ation] to . . . original condition.” *Northern Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.*, 85 Wash.2d 920, 924, 540 P.2d 1387 (1975); citing *Colella v. King County*, 72 Wash.2d 386, 433 P.2d 154 (1967).

Skamania County also tries to convert an affidavit recounting anecdotal evidence of Ecology’s conclusion that it may be safer to leave debris in place, and the response from Rose Longoria, Biologist, Yakima Nation, to the effect that:

she would agree with Ecology only if the debris were stationary and contained in soil, which she knows is not the case. To the point, Ms. Longoria stated that the Yakima Nation had concluded that the debris is continually migrating and affecting the Canyon Creek ecosystem as it crosses plaintiffs’ property.

CP 144, ln. 12-20. The foregoing is not an admission, it is *counsel’s* report of informal agency comments, which does not relieve the County from the burden of proving its affirmative defense that the trespass is not abatable.

Actual Damages v. Intentional Acts

Skamania County argues “Nelson makes no assertion that [it] engaged in tortious activity since [1978].” *Brief of Respondent* at 5. Contrary to the County’s argument, plaintiffs have alleged, throughout proceedings, that the County’s failure to alter its chronic and unreasonable behavior of allowing debris to migrate onto plaintiffs’ property, and its failure to cleanup debris that previously migrated, constitute breaches of the County’s continuing obligation under *Bradley*, which defined “continuing trespass” as “[a]n unprivileged remaining on land in another’s possession[, that] continues until the intruding substance is removed,” *Bradley*, 104 Wash.2d at 693; and *Fradkin*, holding that “[t]he trespasser is under a continuing duty to remove the intrusive substance or condition.” *Fradkin*, 96 Wash.App. at 125-26. It is only the County’s substitution of the phrase “tortfeasor engaged in tortuous activity” in place of the correct element, “victim suffered actual damage,” which supports the County’s contention that plaintiffs have no actionable trespass.

Skamania County cites the Washington Real Property Deskbook, §106.4(4) for its argument that “the rule [of continuing trespass] does not apply to extend the statute of limitations for ongoing damages resulting from an existing condition which was created many years before.” *Brief of*

Respondent at 8. In affect, the County argues that successive *acts* within three years prior to filing suit, not successive *damages*, govern relief. As an initial matter, we note that the Deskbook is not authority that the court is bound to follow. *Albice v. Premier Mortgage Services of Washington, Inc.*, 239 P.3d 1148, 1154, 157 Wash. App. 912 (2010), *affirmed*, 174 Wash.2d 560 (2012). Moreover, the Deskbook section noted by the County pertains to *nuisance*, citing the decision in *Riblet v. Spokane-Portland Cement Co.*, 41 Wash.2d 249, 248 P.2d 249 (1952); while the corresponding section pertaining to *trespass* recognizes that *Riblet* was overruled in *Bradley*:

The *Bradley* court also held that the defendant's conduct was a continuing trespass, that the three-year statute of limitations, RCW 4.16.080(1), applied, and that the plaintiffs could obtain damages for the events which occurred within the last three years. The court refused the invitation to apply the discovery rule for statute of limitation purposes. The court stated that, to the extent inconsistent, *Riblet v. Spokane-Portland Cement Co.*, 41 Wash.2d 249, 248 P.2d 380 (1952); *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526, 285 P. 446 (1930); and *Sterrett v. Northport Mining & Smelting Co.*, 30 Wash. 164, 70 P.266 (1902), are overruled.

Washington Real Property Deskbook, Vol.5, §68.4, page 68-6.

Turning then to actual authorities, this issue was addressed in *Pepper v. J.J. Welcome* as follows:

The 3–year statute of limitations limits the filing of claims, not the introduction of evidence of acts giving rise to those claims.

RCW 4.16.080. . . . The [trial] court denied Welcome/Backstrom’s motion to dismiss the negligence claims and noted it would exclude evidence of pre–1983/84 acts as barred by the statute of limitations. However, the court’s order implementing the decision dismissed negligence claims which were based upon acts which had occurred pre–1983/84, but not evidence of acts causing post–1983/84 damages. The court admitted a voluminous amount of material offered by Pepper/Jaffe concerning pre–1983/84 events. We find no abuse of discretion in the court’s allowing the jury to consider pre–1983/84 events and acts which may have caused later damages.

Pepper v. J.J. Welcome Const. Co., 73 Wash.App. 523, 540-41, 871 P.2d 601, review denied, 124 Wash.2d 1029, 883 P.2d 326 (1994), *overruled on other grounds by Phillips v. King County*, 87 Wash.App. 468, 943 P.2d 306 (1997), *aff’d on other grounds*, 136 Wash.2d 946, 968 P.2d 871 (1998). In the present case, plaintiffs alleged that Skamania County’s act of siting and maintaining a land-fill dump-site on a hilltop causes continuing trespass and injury as debris migrates down steep grades to plaintiffs’ property. As contemplated in *Pepper*, County acts which occurred more than three years prior to filing suit caused continuing damage during the three-year period, and thereafter until entry of judgment. *Woldson v. Woodhead*, 149 P.3d 361, 365-66, 159 Wash.2d 215 (2006). Plaintiffs *also* allege that the County’s failure to *remove*

debris which migrated prior to the three-year period constitutes continuing trespass without further action.

Skamania County cites *Crystal Lotus v. Shoreline* in support of its argument that an “intentional act” is necessary during the three-year period of limitations. However, the County quotes the holding out of context by deleting the next sentence which provides “This [lack of intentional action] precludes *injunctive* relief.” *Crystal Lotus Enterprises Ltd. v. City of Shoreline*, 167 Wash.App. 501, 506, 274 P.3d 1054 (2012), emphasis added. It seems trivially true that, absent continuing action, there is nothing to enjoin; however, we note an historical line of authority recognizing the victim’s right to enjoin trespass notwithstanding a complete lack of intentional action:

Here, as the trial court properly ruled, White’s trespass cannot be remedied by an award of damages because it is not causing more than de minimis physical damage to Hedlund’s property. Nevertheless, it is a trespass which, absent an injunction, Hedlund will be forced to endure for an indefinite period in the future. Under these circumstances, it is “manifestly unreasonable” to deny an injunction, . . . and one should issue if at the time this matter is returned to the trial court White’s trespass is yet ongoing.

Hedlund v. White, 67 Wash.App. 409, 418, 836 P.2d 250 (1992); citing *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wash.2d 261, 264, 721 P.2d 946 (1986); and *Radach v. Gunderson*, 39

Wash.App. 392, 401, 695 P.2d 128, *review denied*, 103 Wash.2d 1027 (1985).

The remainder of the paragraph in *Crystal Lotus* clarifies that it is evidence of *damages*, not action, within three years prior to filing suit which supports damage claims. *Crystal Lotus*, 167 Wash.App. at 506.

In the present case, plaintiffs have provided evidence of damages from continuing migration of debris onto their property, occurring within three years prior to filing suit. *Supra* at 3-4; citing *CP 172-73*, *CP 189*. Common sense precludes any implication that debris tumbling down steep grades will stack neatly; leaving only the inference that additional debris results in additional interference with the use and enjoyment of plaintiffs' property. In support of such inference, Warren Krager, R.G., C.E.G., bases his opinion upon visual evidence that the 2009 "debris flow slide scar was not present in earlier available photographs." *CP 172*.

In addition, Mr. Krager concludes that without corrective action, damage will continue to the plaintiffs, neighboring land owners, and public waterways:

From our observations, it is clear that without massive clean up and environmental restoration of Tax Lot 200, Tax Lot 201, Tax Lot 300, Canyon Creek and its tributary creek, releases of landfill refuse onto private land and into public water courses will continue unabated for decades into the future. We expect

that debris flows, mass wasting on steep slopes and refuse movement will be relatively slow during period of warm, dry, summer weather. Conversely, during heavy winter rain, snow and storm events, landfill refuse debris flows will have very high potential to move down slope at dangerously high velocities, potentially mobilizing thousands of tons of refuse and large debris into the Canyon Creek and Washougal river drainages. Further debris dams and creek blockages should be expected in the future. Low-lying residential properties on the creek and river banks below the source of refuse and debris flows are considered to be at risk from future catastrophic debris flows, river and creek blockages, and flood and debris torrents resulting from ruptures of debris dams in the creek channels.

CP 173.

As noted in the *Brief of Appellants*, it is the *fact* of damage, not the *amount*, which must be shown to prevent summary judgment:

The plaintiff offered evidence that his land had been damaged as a result of the collecting and discharge of surface waters upon his land in an unnatural manner. He claimed a large amount of damage and may be able to prove only a minimum; nevertheless, he should have his day in court.

Wilber Development Corp. v. Les Rowland Const. Inc., 83 Wash.2d 871, 877, 523 P.2d 186 (1974); accord *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wash.2d 705, 712, 713, 257 P.2d 784 (1953); and *Alpine Industries, Inc. v. Gohl*, 30 Wash.App. 750, 754, 637 P.2d 998 (1981).

* * *

Characterization v. Subsumption

Skamania County argues that *Pepper v. J.J. Welcome* and *Kaech v. Lewis County* preclude trespass claims, summarizing the holding as follows:

Where a trespass claim arises from the same facts that support a negligence claim, the trespass claim is subsumed into the general claim for negligent injury to real property, and the trespass cause of action may be dismissed.

Brief of Respondent at 7. This is a categorical, misstatement of the rule which actually holds that “[a] party’s characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls.” *Pepper*, 73 Wash.App. at 546; citing *New York Underwriters Ins. Co. v. Doty*, 58 Wash.App. 546, 794 P.2d 521 (1990); *Boyles v. Kennewick*, 62 Wash.App. 174, 813 P.2d 178, *review denied*, 118 Wash.2d 1006, 822 P.2d 288 (1991).

In the present case, the nature of trespass is continuing. In *Will v. Frontier*, cited by the County, the Court of Appeals held that “[t]he continuing trespass statute of limitations does not apply to *negligence* and implied warranty of habitability claims[because] each of these causes of action has its own applicable statute of limitations;” however, dismissal of continuing trespass claims was not appealed in *Will* and, therefore, not before the court. *Will v. Frontier Contractors*, 121 Wash.App. 119, 124, 89 P.3d 242 (2004),

review denied, 153 Wash.2d 1008 (2005).

Applying the correct rule from *J.J. Welcome*, demands the conclusion that continuing trespass is *not* subsumed within negligence because the *nature of the claim* is different: the trespass is *continuing* while negligence is not. Skamania County would have the court stand this issue *on its head*, and infer, from minor to major premise, that the period of limitations governing negligence controls the nature of continuing trespass.

The Supreme Court concurs with the foregoing, holding that “[a]n action in trespass is not predicated upon negligence[, and, a] continuing trespass is not tantamount to a continuing negligence.” *Lindquist v. Mullen*, 45 Wash.2d 675, 677, 277 P.2d 724 (1954), overruled on other grounds in *Ruth v. Dight*, 75 Wash.2d 660, 667, 453 P.2d 631 (1969). Likewise, the Court is not limited by a party’s characterization where the cause of action is adapted to the relief sought:

When this right against encroachment is invaded, we think it of little moment what the theory of the injured party’s cause of action may be. Whether it be brought on the theory of trespass, nuisance, negligence, or violation of rights guaranteed by Art. 1, §16, of the Constitution, is not important. If, under the facts and circumstances of the particular case, the theory of the cause of action is adapted to the relief sought, it is sufficient.

Peterson v. King County, 41 Wash.2d 907, 912, 252 P.2d 797 (1953).

* * *

Evidence

Skamania County alleges that plaintiffs' witness, Greg Morris, "has no expertise or personal knowledge which would allow him to offer admissible testimony as to whether any debris moved from the County property to the Nelson property since 2009." *Brief of Respondent* at 11. The County further alleges that "the report attached [to the Affidavit of Warren Krager, *CP 168-74*] would be inadmissible at trial, as it is neither in the form of a declaration not offered as sworn testimony." *Brief of Respondent* at 12. Contrary to the County's allegation, the Warren Krager's report is certified, *CR 174*, in compliance with CR 56(e), which provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." *Id.*

Moreover, the record includes *no* motion to strike either the Morris Declaration or the Krager Affidavit. Neither has Skamania County has filed a cross-appeal challenging the Court's consideration of those documents. Hence, the issue of admissibility is not before the court on the present appeal:

Defendant contends that the affidavit produced by plaintiff in opposition to summary judgment is not competent evidence to withstand such a motion. Defendant argues that the engineer's affidavit does not comply with CR 56(e) because, among others, the statement about cabin attendants being required to walk backward in performance of some of their duties is not based upon personal knowledge. The record before us, however, does not reveal any motion to strike the affidavit or any portion thereof prior to the trial court's action. Failure to make such a motion waives deficiency in the affidavit if any exists.

Lamon v. McDonnell Douglas Corp., 91 Wash.2d 345, 352, 588 P.2d 1346 (1979); citing *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wash.2d 874, 431 P.2d 216 (1967); 10 C. Wright and A. Miller, Federal Practice and Procedure §2738 (1973). The Supreme Court, in *Lamon*, went on to hold that, viewing inferences therefrom in the light most favorable to the nonmoving party, the affidavit "created an issue of material fact which necessitated the denial of summary judgment." *Lamon*, 91, Wash.2d at 353.

* * *

Subsequent Purchaser Rule

Whether standing to allege inverse condemnation was deflated by plaintiffs' purchase of the property after debris migration had begun turns upon the justification behind the rule, and what the rule excludes. The rule is usually justified based upon anticipated adjustment of the purchase price for

known defects; however, courts sometimes note that takings claims are personal property not transferred under a deed unless explicitly mentioned therein. Hence, the subsequent purchaser rule would seem to exclude plaintiffs' claims unless the reason for the rule is considered in context of plaintiffs' allegations and the affidavits of record. As noted above, plaintiffs' witnesses attested that debris has continually migrated from Skamania County's property onto plaintiffs' property during the three year period prior to filing suit. Again, we distinguish the present case from flooding cases because water always finds and occupies the lowest elevation, while new debris migrating down steep hills cannot occupy the same location occupied by debris which arrived earlier. As a matter of logic, additional debris migration will occupy, and deprive plaintiffs' use and enjoyment, of additional areas within their property. It is only by misdirection that the County can argue prior debris migrations result in the same damage as debris migrations which occurred after plaintiffs' purchase. Hence, if the subsequent purchaser rule applies in the present case, it applies only to takings that occurred prior to their purchase, not additional takings resulting from subsequent debris migrations occurring thereafter.

* * *

IV. CONCLUSION

Summary judgment should be reversed, as discussed in the *Brief of Appellant*, because the Skamania County failed to carry its burden, including the burden of proving its affirmative defense of abatability.

Contrary to Skamania County's argument, the permanence of inverse condemnation, based upon chronic and unreasonable government action, is not inconsistent with the abatability of continuing trespass.

Continuing trespass requires actual damages to the plaintiff, not intentional acts on the part of defendant, during the three-year period prior to filing suit. In the present case, trespass damages are attested in affidavits of plaintiffs' witnesses, which the County did not move to strike.

Continuing trespass is not subsumed in negligence, and the subsequent purchaser rule bars only inverse condemnation damages occurring prior to the date of plaintiffs' purchase.

RESPECTFULLY SUBMITTED this 16th day of May, 2013.

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**REPLY BRIEF OF APPELLANTS
(TO BRIEF OF SKAMANIA COUNTY) - 21**

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CERTIFICATE OF SERVICE

I certify that on the 16th day of May 2013, I caused a true and correct copy of this *Reply Brief of Appellants* to be served on the following in the manner indicated below:

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